

# Exhibit 6

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Petition for Waiver of  
Papa Murphy's Holdings, Inc. and  
Papa Murphy's International L.L.C.

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) CG Docket No. 02-278  
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) DA 16-302  
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)  
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)

**OPPOSITION TO PAPA MURPHY'S HOLDINGS, INC. AND PAPA MURPHY'S  
INTERNATIONAL, LLC'S PETITION FOR WAIVER**

John Lennartson is the plaintiff in a putative class action lawsuit brought against Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC (collectively, "Papa Murphy's") for violations of the Telephone Consumer Protection Act ("TCPA"). *See Lennartson v. Papa Murphy's Holdings, Inc.*, No. 3:15-cv-05307 (W.D. Wash. May 7, 2015).<sup>1</sup> On February 22, 2016—almost two-and-a-half years after the Commission's 2012 Order<sup>2</sup> became effective and more than nine months after Mr. Lennartson filed his lawsuit—Papa Murphy's submitted a Petition<sup>3</sup> to the Commission seeking a waiver of the written consent requirement imposed by the 2012 Order. Pursuant to the Commission's notice requesting comments to the Petition,<sup>4</sup> Mr. Lennartson files this opposition.

**INTRODUCTORY STATEMENT**

Papa Murphy's, in its Petition, omitted a significant fact: the federal district court presiding over the *Lennartson* case has determined that Papa Murphy's failed to comply

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<sup>1</sup> A copy of the complaint is attached as Ex. A.

<sup>2</sup> *In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830 (Feb. 15, 2012) (hereinafter, "2012 Order").

<sup>3</sup> Petition of Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC for Waiver of 47 C.F.C §§ 64.1200(a)(2), 64.1200(f)(8), CG Docket No. 02-278 (filed February 22, 2016) (hereinafter, "Petition").

<sup>4</sup> Consumer & Governmental Affairs Bureau Seeks Comment on a Petition For Retroactive Waiver Filed by Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC., CG Docket No. 02-278; DA 16-302 (Mar. 22, 2016).

with the written consent requirement in the 2012 Order from which it now seeks a waiver. *See Lennartson*, Dkt. 40 (order dated Jan. 5, 2016).<sup>5</sup> Prior to submitting its Petition, Papa Murphy's unsuccessfully argued before the United States District Court for the Western District of Washington that it had no obligation to comply with the written consent requirement in the 2012 Order for consents it obtained prior to October 16, 2013 (the effective date of the 2012 Order). After careful consideration, the Court rejected Papa Murphy's arguments and held as follows:

Papa Murphy's failed to comply with the requirements of written consent as defined by the 2012 Order.

...

Papa Murphy's did not follow the 2012 Order's requirements, nor did it petition the FCC for clarification or relief. Despite the FCC's acknowledgement that some uncertainty surrounded its 2012 Order, Papa Murphy's reliance 'on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity' upon clarification, because Papa Murphy's did not rely on settled law contrary to the 2012 Order. Instead, it relied on its own erroneous reading of that Order.

...

**If the 2012 Order confused Papa Murphy's, it could have petitioned the FCC for relief years ago**, as the Coalition of Mobile Engagement Providers and Direct Marketing Association did.

Ex. B at 5, 7 (citation omitted and emphasis added).

Papa Murphy's Petition must be seen for what it is: an attempt to nullify the Court's order. In seeking a waiver from the Commission, Papa Murphy's advanced similar arguments that the Court already rejected—and without providing any notice of its Petition to the Court or Mr. Lennartson.<sup>6</sup> For the reasons stated below, Mr. Lennartson respectfully requests that the Commission deny Papa Murphy's Petition in its entirety.

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<sup>5</sup> A copy of the Court's order is attached as Ex. B.

<sup>6</sup> It was only through hypervigilance that Mr. Lennartson's counsel became aware of the Petition, as Papa Murphy's did not provide the Court or Mr. Lennartson with any notice of its filing which, essentially, attempts to vitiate the underlying case.

## FACTUAL BACKGROUND

Papa Murphy's markets and promotes its products and services through text message advertisements sent to cell phones of consumers throughout the nation. *See* Ex. A ¶ 3. Papa Murphy's obtains consumers' cell phone numbers for use in its text marketing campaigns in two ways: (1) when consumers register on the Papa Murphy's website and (2) when consumers send text messages to Papa Murphy's in response to a promotional advertisement. *See* Petition, Brawley Decl. ¶ 2.

On its website, Papa Murphy's used the following language to sign up consumers to receive text promotional offers:

To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive **four text messages per month**. To unsubscribe from our text club at any time, text **STOP** to 90421.

*See* Exs. C & D.<sup>7</sup> This language does not contain the proper disclosures as defined by the 2012 Order—it is silent about the use of an autodialer and silent that consent to receive texts is not a condition of purchase.<sup>8</sup> Further, Papa Murphy's utilized the above language as early as 2012 and continuing through June 2015. And, at times, Papa Murphy's did not use any disclosures whatsoever. *See* Exs. E & F.

Papa Murphy's also obtains cell phone numbers from consumers sending text messages to short codes that appear in Papa Murphy's advertisements.<sup>9</sup> Like the language on Papa Murphy's website, the language appearing in its promotional advertisements failed to include the proper disclosures required by the 2012 Order.

Accordingly, every text message Papa Murphy's sent after October 16, 2013, was sent without the proper consent of the recipient. Moreover, Papa Murphy's admitted that

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<sup>7</sup> Exs. C to F are archived pages of Papa Murphy's website.

<sup>8</sup> To satisfy the written consent requirements, the signed agreement must include a clear and conspicuous disclosure that (1) the company will call using an autodialer and (2) consent is not a condition of purchase. *See* 47 C.F.R. § 64.1200(f).

<sup>9</sup> An example of one of Papa Murphy's advertisements is attached as Ex. G.

it did not amend its language, or stop sending text messages, until sometime after June 17, 2015—roughly twenty months after the 2012 Order became effective. *See* Petition at 2–3. In other words, even after the effective date of the 2012 Order, Papa Murphy’s continued to register new consumers to its text marketing campaign without obtaining proper consent. In all, the facts demonstrate that Papa Murphy’s ignored the consent requirement imposed by the 2012 Order.

## **ARGUMENT**

Papa Murphy’s, in its Petition, seeks both a retroactive and prospective waiver of the written consent requirement as defined by the 2012 Order. The Commission has the regulatory authority to waive a provision of its rules only on “petition if **good cause** is shown therefor.” 47 C.F.R. §1.3 (emphasis added). To demonstrate good cause, a petitioner “must plead with particularity the facts and circumstances which warrant” a waiver instead of making “generalized pleas.” *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969). The petitioner must “adduce concrete support, preferably documentary,” of “special circumstances” warranting a waiver. *Id.*; *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008). Importantly, ignorance or complete disregard of the Commission’s rules does not amount to good cause: “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”<sup>10</sup> Papa Murphy’s has failed to demonstrate good cause.

### **I. Papa Murphy’s Is Not “Similarly Situated” to the Petitioners Granted Waivers in the 2015 Order.**

Papa Murphy’s attempts to shoehorn itself into the very narrow group of petitioners granted a waiver in the 2015 Order.<sup>11</sup> In the 2015 Order, the Commission found that good cause existed to grant waivers to the Coalition of Mobile Engagement

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<sup>10</sup> *In re Rules & Regs. Implementing the TCPA of 1991*, 29 F.C.C. Rcd. 13998 ¶ 26 (2014).

<sup>11</sup> *In re Rules & Regs. Implementing the TCPA of 1991*, 30 F.C.C. Rcd. 7961 (July 10, 2015) (“2015 Order”).

Providers (“Coalition”) and the Direct Marketing Association (“DMA”). Unlike Papa Murphy’s, the Coalition and DMA proactively filed their petitions seeking clarification and relief on October 17, 2013—one day after the 2012 Order became effective. Papa Murphy’s, on the other hand, waited an additional two-and-a-half years after the 2012 Order became effective to file its Petition.<sup>12</sup> The Coalition and DMA based their petitions on the fact that they obtained written consents valid under the old rule, and that it was unclear whether those consents remained valid because of the wording of the new rule.<sup>13</sup>

In finding good cause to grant a waiver, the Commission clarified that the 2012 Order did not grandfather *any* existing consents that did not otherwise fully satisfy the new written consent requirement.<sup>14</sup> But the Commission recognized that the language in the 2012 Order “could have reasonably been interpreted” to mean that previously obtained written consents would remain valid even if they do not fully satisfy the new rule. To that end, the Commission found that the Coalition and DMA had provided sufficient “evidence of confusion” on their part as to the noted ambiguity.<sup>15</sup> Accordingly, the Commission granted a limited waiver exclusively to the Coalition and DMA (and its members as of the release date of the 2015 Order), within which they were expected to obtain the proper form of written consent.<sup>16</sup>

Papa Murphy’s attempts to now ride the coattails of the Coalition and DMA by arguing that it is similarly situated as it, too, was confused by the 2012 Order. But by claiming confusion about whether the 2012 Order applied to previously obtained

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<sup>12</sup> See generally Petition for Declaratory Ruling of the Coalition, *In re Rules & Regs. Implementing the TCPA of 1991* (“hereinafter, “Coalition Petition”), CG Docket No. 02-278 (filed Oct. 17, 2013); Petition for Forbearance by the DMA, *In re Rules & Regs. Implementing the TCPA of 1991* (hereinafter, “DMA Petition”), CG Docket No. 02-278 (filed Oct. 17, 2013).

<sup>13</sup> See Coalition Petition at 13; DMA Petition at 3–4; see also 2015 Order at 8013, 8015.

<sup>14</sup> 2015 Order ¶ 100.

<sup>15</sup> *Id.* ¶ 101.

<sup>16</sup> *Id.*

consents, Papa Murphy's necessarily implies that it was, in fact, aware of the 2012 Order in the first place. Such awareness, however, cannot be reconciled with the fact that Papa Murphy's continued to opt-in consumers without the proper disclosures even after the 2012 Order went into effect. Had Papa Murphy's, in fact, been aware of the 2012 Order, it would have amended its language for opting-in consumers going forward. Instead, Papa Murphy's did nothing, and continued to opt-in consumers after October 16, 2013, without the proper disclosures.<sup>17</sup> These facts do not support Papa Murphy's asserting that its failure to comply was due to confusion. Rather, the facts demonstrate that Papa Murphy's was simply unaware of the 2012 Order or intentionally decided to violate it. Either way, the facts do not support Papa Murphy's claim that it is "similarly situated" to the Coalition and DMA. Neither do the facts amount to special circumstances that warrant deviation from the 2012 Order.

## **II. Public Interest Would Not Be Served by Granting the Petition.**

The "risk of substantial liability in private rights of action is, by itself, [not] an inherently adequate ground for waiver."<sup>18</sup> Yet Papa Murphy's claims that the public interest would be served if it was absolved from liability in the underlying lawsuit. Papa Murphy's interest in escaping liability in a civil action, however, is heavily outweighed by consumers' privacy rights, which Congress sought to protect in enacting the TCPA.<sup>19</sup>

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<sup>17</sup> For example, Ex. C & D are archived pages of Papa Murphy's website, dated January 31, 2014, and March 30, 2014, respectively, which do not contain the disclosures required by the 2012 Order.

<sup>18</sup> *In re Rules & Regs. Implementing the TCPA of 1991*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 ¶ 28 (Oct. 30, 2014).

<sup>19</sup> Congress enacted the TCPA in response to "[v]oluminous consumer complaints" and "outrage[]" over the proliferation of intrusive, nuisance telemarketing practices. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744–45 (2012). In doing so, Congress sought to "protect the privacy interests of telephone subscribers," *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009), by providing consumers an effective way to protect their privacy interests. *See, e.g., Hooters of Augusta, Inc. and Sam Nicholson v. Am. Global Ins. Co. & Zurich Ins.*, 272 F. Supp. 2d 1365 (S.D. Ga. July, 2003) (concluding after reviewing the TCPA's extensive legislative history that the TCPA is a remedial statute).

Indeed, to encourage the private enforcement of the TCPA, the statute affords consumers a private right of action, which Mr. Lennartson has exercised by bringing his action on behalf of himself and thousands of consumers subjected to Papa Murphy's text messages. Relieving Papa Murphy's from the 2012 Order now—two-and-a-half years after it went into effect, after a United States District Court already ruled that Papa Murphy's failed to comply with the order, and in the face of zero evidence demonstrating that Papa Murphy's had been laboring under a misinterpretation of the order—would set a precedent giving any TCPA defendant the ability to delay and prejudice litigation by submitting petitions asking the Commission to retroactively waive binding rules. Awarding Papa Murphy's with a waiver to escape liability under these circumstances would not serve, but impair, the public interest.

### **III. If the Commission Entertains the Petition, It Should Allow Discovery.**

As discussed, the facts before the Commission demonstrate that Papa Murphy's was not confused by the 2012 Order. But should the Commission decide to entertain the Petition, then it should allow Mr. Lennartson to investigate, either before the Commission or the Court, whether Papa Murphy's was in fact confused as to the requirements of the 2012 Order. The parties in the underlying lawsuit have not engaged in any discovery. Because the Petition seeks a determination of the Commission's policies regarding waivers related to the written consent requirement, Mr. Lennartson respectfully requests that the Commission not absolve Papa Murphy's of liability prior to any fact finding. The Commission should either hold such proceedings as described,<sup>20</sup> or stay a ruling on the Petition until Mr. Lennartson can conduct discovery in the underlying case.<sup>21</sup>

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<sup>20</sup> The Commission may initiate proceedings “for the purpose of obtaining information necessary or helpful in the determination of its policies.” 47 C.F.R. § 1.1.

<sup>21</sup> It should be noted that the Court, based on Papa Murphy's request, has stayed Mr. Lennartson's case pending the U.S. Supreme Court decision in *Spokeo, Inc. v. Robbins*, 135 S. Ct. 1892 (2015). As such, the parties cannot engage in the discovery process in that case until the Court lifts the stay.

## CONCLUSION

In light of the foregoing, Mr. Lennartson respectfully requests that the Commission deny Papa Murphy's Petition for a retroactive and prospective waiver in its entirety. The written consent requirement in the 2012 Order was promulgated after affording interested parties the time to comment on the Commission's authority to adopt it. The Commission further provided "reasonable time for affected parties to implement necessary changes" by delaying the effective date of the new rule. 2012 Order ¶ 66. Papa Murphy's has had two-and-a-half years to comply with the 2012 Order. Good cause does not exist to grant Papa Murphy's a prospective or retroactive waiver of the written consent requirement.

DATED this 21st day of April, 2016.

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***Attorneys for Commenter  
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# Exhibit A

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

JOHN LENNARTSON, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

PAPA MURPHY'S HOLDINGS, INC.; and  
PAPA MURPHY'S INTERNATIONAL,  
L.L.C.,

Defendants.

No.

CLASS ACTION COMPLAINT

(JURY TRIAL DEMANDED)

Plaintiff John Lennartson ("Plaintiff"), individually and on behalf of all other individuals and entities similarly situated, brings this class action complaint against Defendants Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC. (collectively referred to herein as "Defendants") for damages, injunctive relief, and any other available legal or equitable remedies, resulting from Defendants' contacting Plaintiff and Class members through SMS or "text" messages on Plaintiff's and Class members' cellular telephones, in violation of the Telephone Consumer Protection Act<sup>1</sup> ("TCPA"), thereby invading Plaintiff's and Class members' privacy. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

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<sup>1</sup> 47 U.S.C. §227 *et seq.*

## I. INTRODUCTION

1. According to a recent study by the Pew Research Center, 69% of cellular users who use text messaging receive unwanted text message spam, and “[o]f those texters, 25% face problems with spam/unwanted texts at least weekly.”<sup>2</sup> Plaintiff is one such person who regularly receives unwanted text messages.

2. To advertisers, text message advertising is a powerful and irresistible method of mass communication. At very minimal cost, a business can achieve targeted, immediate, and vast promotion of its brand and products. At the same time, text messages are uniquely intrusive. Each text message advertisement directs special importance to itself by causing a telephone to buzz or ring, and the advertisement is placed quite literally into the hands of a consumer. As Defendants have noted, “We find when we can get on their handsets, we can get their attention and really use it to drive traffic.”<sup>3</sup>

3. As part of their effort to promote business, the Defendants market and promote their products and services through text message advertisements sent to cellular telephones of consumers throughout the nation. Defendants “have instructed [their] market to be as aggressive as possible with text [messaging],” stating, “we want people to act now with it.”<sup>4</sup>

4. Defendants’ practice caused consumers actual harm, not only because consumers were subjected to the aggravation that necessarily accompanies text message advertisements, but also because consumers frequently have to pay their cell phone service providers for the receipt of such spam, and such messages diminish battery life, waste data storage capacity, and are an intrusion upon privacy and seclusion.

5. In order to redress these injuries, Plaintiff, on behalf of himself and the proposed

<sup>2</sup> See <http://www.pewinternet.org/2012/08/02/mobile-phone-problems/> (last visited May 4, 2015).

<sup>3</sup> Chantal Tode, *Papa Murphy’s heats up revenue-driving SMS program with personalized messages*, Mobile Commerce Daily (Apr. 2, 2015), available at <http://www.mobilecommercedaily.com/papa-murphys-heats-up-revenue-driving-sms-program-with-personalized-messages>.

<sup>4</sup> Lauren Johnson, *Papa Murphy’s expands SMS effort to 26 states*, Mobile Commerce Daily (Aug. 3, 2012), available at <http://www.mobilecommercedaily.com/papa-murphy%E2%80%99s-further-sms-push-with-rollout-program-to-26-states>

1 Class of similarly situated individuals described below, brings this suit under the TCPA, which  
2 specifically prohibits unpermitted voice and text calls to cell phones.

3 6. As will be discussed, Defendants have sent text messages to consumers without  
4 their prior express written consent to receive such text messages, and in a manner that violates the  
5 privacy rights of Plaintiff and members of the putative Class.

6 7. The TCPA was designed to prevent calls and messages like the ones described  
7 within this Complaint, and to protect the privacy of citizens like Plaintiff.

8 8. On behalf of the Class, Plaintiff seeks an injunction requiring Defendants to cease  
9 all unlawful text messages and an award of statutory damages to Class members, together with  
10 costs and reasonable attorney's fees.

## 11 **II. JURISDICTION AND VENUE**

12 9. This Court has jurisdiction over this action under 28 U.S.C. §1331 and 47 U.S.C.  
13 §227.

14 10. This Court has personal jurisdiction over Defendants because Defendants conduct  
15 substantial business in Washington, Defendants are registered to do business in Washington, and  
16 the acts alleged herein originated in this District.

17 11. Venue is proper in this District under 28. U.S.C §1391(b) because Defendants  
18 reside in this district and a substantial part of the events giving rise to the claim occurred and  
19 originated in this District.

## 20 **III. PARTIES**

21 12. Plaintiff is an individual who resides in Plymouth, Minnesota.

22 13. Defendant Papa Murphy's Holdings, Inc. is a corporation organized and existing  
23 under the laws of the State of Delaware.

24 14. Defendant Papa Murphy's International, LLC is a Limited Liability Company  
25 organized and existing under the laws of the State of Delaware with its principle place of business  
26 at 8000 NE Parkway Dr. #350 Vancouver, WA.

15. Defendants are the franchisors and operators of the largest Take ‘N’ Bake pizza chain in the United States. In all, as of December 2014, Defendants operate a total of 1,461 stores under their Papa Murphy’s brand.

#### IV. COMMON FACTUAL ALLEGATIONS

16. In recent years, marketers who often have felt stymied by federal laws limiting solicitation by telephone, facsimile machine, and e-mail have increasingly looked to alternative technologies through which to cheaply send bulk solicitations. One of the newest types of such bulk marketing is to advertise through Short Message Services.

17. The term “Short Message Service” or “SMS” describes a messaging system that allows cellular telephone subscribers to use their cellular telephones to send and receive short text messages, usually limited to 120 – 500 characters.

18. An “SMS message” is a text message call directed to a wireless device through the use of the telephone number assigned to the device. When an SMS message call is successfully made, the recipient’s cell phone rings, alerting him or her that a call is being received.

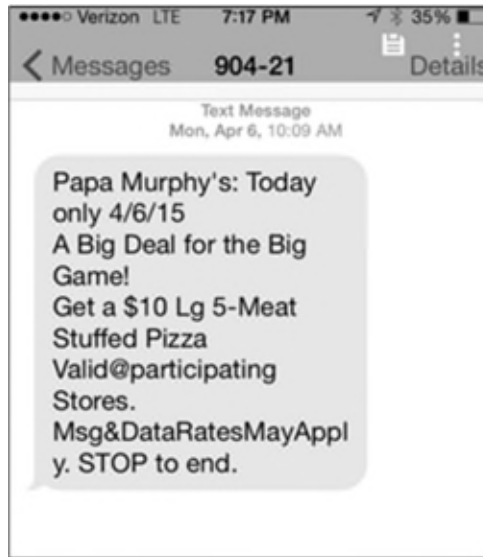
19. Unlike more conventional advertisements, unwanted SMS calls can actually cost their recipients money, because cell phone users more frequently pay their respective wireless service providers either for each text message call they receive or incur as usage allocation deduction to their text plan, regardless of whether or not the message is authorized.

20. Text messages, or “SMS” calls, are “calls” within the context of the TCPA.

#### V. PLAINTIFF’S FACTUAL ALLEGATIONS

21. On or about April 6, 2015, Plaintiff’s cell phone rang, indicating that a text call was being received.

22. The “from” field of the transmission was identified as “90421,” which is an abbreviated telephone number known as a SMS short code operated by Defendants and/or Defendants’ agents. The body of this text message read as follows:



23. Plaintiff has received numerous, text message advertising from Defendants much like the one described above, in knowing violation of Plaintiff's privacy. Such additional text message advertising originated from the same 90421 short code and similarly promoted Defendants' products.<sup>5</sup>

24. Defendants sent or transmitted, or had sent or transmitted on their behalf, the same or substantially the same text messages en masse to a list of thousands of wireless telephone numbers using a computerized automatic telephone dialing system (also known as an "auto-dialer") as defined by the TCPA that stores telephone numbers from a database, or dials random or sequential numbers.

25. Indeed, Defendants have stated that "offers are blasted" based on its mobile database.<sup>6</sup>

26. Plaintiff did not provide prior express written consent to receive text message marketing from Defendants.

<sup>5</sup> A true and correct copy of some of the SMS text messages received by Plaintiff is attached hereto as Exhibit "A."

<sup>6</sup> Rimma Kats, *Papa Murphy's grows mobile database, pushes offers via SMS campaign*, Mobile Commerce Daily (Sept. 23, 2011), available at <http://www.mobilecommercedaily.com/papa-murphy%E2%80%99s-grows-mobile-database-pushes-offers-via-sms-campaign>.

27. All members of the putative Class received similar messages that were sent en masse using an auto-dialer; the device Defendants used to send the aforesaid text messages had the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

## **VI. CLASS ACTION ALLEGATIONS**

28. Plaintiff brings this action on behalf of himself and as a class action under the provisions of Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure. The proposed Class is defined as follows:

All persons or entities in the United States and its Territories who received one or more text message advertisements from or on behalf of Defendants since October 16, 2013.

Plaintiff reserves the right to redefine the Class prior to class certification.

29. Excluded from the Class are Defendants, Defendants' officers, directors, and employees.

30. This action is properly maintainable as a class action. Members of the proposed Class are so numerous that their individual joinder is impracticable. The precise number of members is unknown to Plaintiff at this time, but is believed to be at least several thousand individuals. The true number of proposed members is, however, known by Defendants, and thus, Class members may be notified of the pendency of this action by first class mail, electronic, and published notice using information in Defendants' membership and marketing records.

31. A class action is superior to other methods for the fair and efficient adjudication of the claims herein asserted, and no unusual difficulties are likely to be encountered in the management of this class action. Additionally, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

32. Rule 23(a)(2) and Rule 23(b)(3) are both satisfied because there are questions of law and fact which are common to the Class and which predominate over questions affecting any

individual Class member. The common questions include, inter alia, the following:

- a. whether Defendants violated the TCPA by sending unauthorized text messages to Plaintiff and members of the proposed Class;
- b. whether the equipment Defendants used to send the text messages in question was an automatic telephone dialing system as defined by the TCPA;
- c. whether such messages were sent to telephone numbers assigned to cellular telephones;
- d. whether the means by which Defendants acquired class members' cellular phone numbers was in a written agreement, bearing the signature of the person called;
- e. whether the means by which Defendants acquired class members' cellular phone numbers clearly and conspicuously informed class members they may receive advertisements or telemarketing messages by means of an automatic telephone dialing system;
- f. whether the means by which Defendants acquired class members' cellular phone numbers clearly and conspicuously informed class members that they were not required to sign or enter into the agreement as a condition of purchasing any property, goods, or services;
- g. whether Defendants' actions were willful.
- h. whether Plaintiff and members of the proposed Class are entitled to statutory damages under the TCPA;
- i. whether Plaintiff and members of the proposed Class are entitled to treble damages based on Defendants' knowing or willful conduct; and
- j. whether Plaintiff and members of the proposed Class are entitled to equitable relief, including but not limited to injunctive relief and restitution.

33. Plaintiff's claims and the claims of members of the Class all derive from a common nucleus of operative facts. That is, irrespective of the individual circumstances of any Class member, liability in this matter will rise and fall with core issues related to Defendants' conduct.

34. Plaintiff's claims are typical of the claims of the Class members. Plaintiff has the same interest as all members of the Class in that the nature and character of the challenged conduct is the same.

35. Plaintiff will fairly and adequately represent and protect the interests of the Class.

1 Plaintiff's interests are entirely consistent with, and not antagonistic to, those of the other members  
2 of the Class. Plaintiff has retained competent counsel experienced in the prosecution of consumer  
3 and class action litigation.

4 36. Defendants have acted or refused to act on grounds generally applicable to the  
5 Class, making injunctive and declaratory relief appropriate with respect to the proposed Class as a  
6 whole.

## 7 **VII. CAUSE OF ACTION**

### 8 **COUNT I** 9 **(Violation of the Telephone Consumer Protection Act)**

10 37. Plaintiff incorporates by reference the foregoing allegations as if fully set forth  
11 herein.

12 38. The TCPA states, in part:

13 It shall be unlawful...(A) to make any call (other than a call made for emergency  
14 purposes or made with the prior express consent of the called party) using any  
15 automatic telephone dialing system or an artificial or prerecorded voice...(iii) to  
any telephone number assigned to a...cellular telephone...

16 47 U.S.C. §227(b)(1).

17 39. The TCPA defines "telemarketing call," or "telephone solicitation," as "the  
18 initiation of a telephone call or message for the purpose of encouraging the purchase or rental  
19 of...goods, or services, which is transmitted to any person." 47 U.S.C. §227(a)(4).

20 40. The TCPA defines an "automatic telephone dialing system" as "equipment which  
21 has the capacity (A) to store or produce telephone numbers to be called, using a random or  
22 sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1).

23 41. Before sending a text message, the party sending the text message must obtain  
24 "prior express consent" from the called party. "Prior express consent" must:

- 25 • Be in the form of an agreement in writing, bearing the written or electronic  
26 signature of the person providing consent;

- Specify the telephone number to which the person is consenting to be called;
- Clearly and conspicuously authorize the company to call the person using an auto-dialer system or prerecorded message for telemarketing purposes; and,
- Clearly and conspicuously disclose that consent is not a condition of purchasing goods or services.
- 27 F.R. §64.1200(f)(8).

42. Defendants made telephone solicitations, including, but not limited to, the text message depicted above, to the wireless telephone numbers of Plaintiff and members of the proposed Class.

43. The text messages sent to Plaintiff and the proposed Class members were sent using equipment that had the capacity to store telephone numbers retrieved from Defendants' database and to dial such numbers. The equipment can also be programmed to generate and dial random or sequential numbers. By using such equipment, Defendants were able to effectively send text messages simultaneously to thousands of wireless telephone numbers en masse without human intervention.

44. The text calls were made through the use of a short code dialing service and without the prior express written consent of Plaintiff and the proposed Class members.

45. Defendants' conduct in sending said text messages violates 47 U.S.C. §227(b)(1)(A)(iii).

46. As a result of Defendants' violation, the members of the Class suffered actual damages by, inter alia, having to pay their respective wireless carriers for the text messages where applicable and, under 47 U.S.C. §227(b)(3)(B), are each entitled to, inter alia, a minimum of \$500 in damages for each violation of the TCPA, and up to \$1,500.00 if Defendants' violation of the TCPA is determined to be knowing or willful.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for relief as follows:

A. That the Court determine that this action may be maintained as a class action under

Rules 23(a), 23(b)(2), and (b)(3) of the Federal Rules of Civil Procedure, that Plaintiff be certified as Class representative and Plaintiff's counsel be appointed as counsel for the Class;

B. That the unlawful conduct alleged herein be declared to be illegal and in violation of TCPA;

C. That Defendants be enjoined from engaging in the same or similar practices alleged herein;

D. That, pursuant to 47 U.S.C. §227(b)(3), Plaintiff and each Class member be awarded their monetary loss, or \$500 in statutory damages for each and every violation, and an award up to \$1,500 for each willful and knowing violation.

E. That judgment be entered against Defendants on behalf of Plaintiff and members of the Class;

F. That Plaintiff and members of the Class recover their costs of the suit, and attorneys' fees as allowed by law; and

G. For all other relief allowed by law and equity.

### **DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all issues so triable.

DATED this 7th day of May, 2015.

KELLER ROHRBACK L.L.P.

By s/Mark A. Griffin

Mark A. Griffin, WSBA #16296  
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Email: Brad.Buhrow@zimmreed.com

*Attorneys for Plaintiff*

●●●○○ Verizon LTE 2:49 PM ↗ 29% 

< Messages (1) 904-21

Details

Text Message  
Mon, Apr 6, 10:09 AM

Papa Murphy's: Today  
only 4/6/15  
A Big Deal for the Big  
Game!  
Get a \$10 Lg 5-Meat  
Stuffed Pizza  
Valid@participating  
Stores.  
Msg&DataRatesMayAppl  
y. STOP to end.

Wed, Apr 15, 10:28 AM

Papa Murphy's: Tax Day  
Special! 1 Lg 1-top Fresh  
Pan + 1 Lg FAVES Pizza,  
just \$10.40! 4/15/15 only.  
Lmt 3 [bit.ly/1yaUQFE](http://bit.ly/1yaUQFE)  
Msg&DataRatesMayAppl  
y. STOP to end.



Text Message

Send

 Messages (1) 904-21

Details

Sat, Apr 18, 10:07 AM

Papa Murphy's: Today  
Only 4.18.2015  
Score a goal a wild deal!  
Get a Family Size 1-  
topping Pizza Just \$8.  
Valid@particStores.  
Msg&DataRatesMayAppl  
y. STOP to end.

Mon, Apr 20, 10:12 AM

Papa Murphy's: Today  
Only 4.20.2015  
It's Hockey Hoopla! Get  
a Large 1-topping thin  
crust pizza Just \$6  
Valid@participStores.  
Msg&DataRatesMayAppl  
y. STOP to end.



Text Message

Send



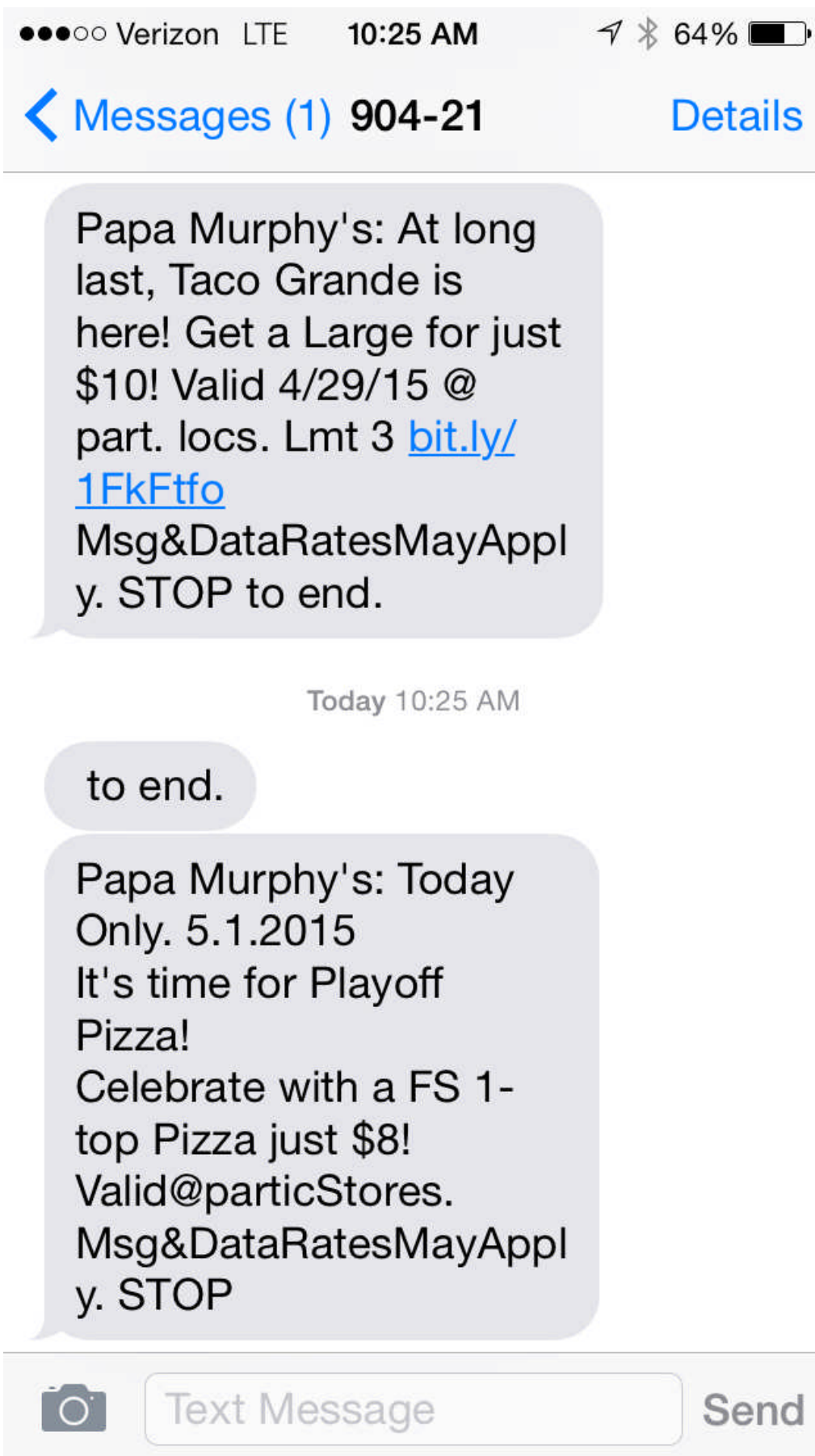
Wednesday 11:50 AM

Papa Murphy's: Today  
Only! 4.22.2015  
Celebrate the State of  
Hockey  
With a \$10 Large 5-Meat  
Stuffed Pizza.  
Valid@particStores  
Msg&DataRatesMayAppl  
y. STOP to end.



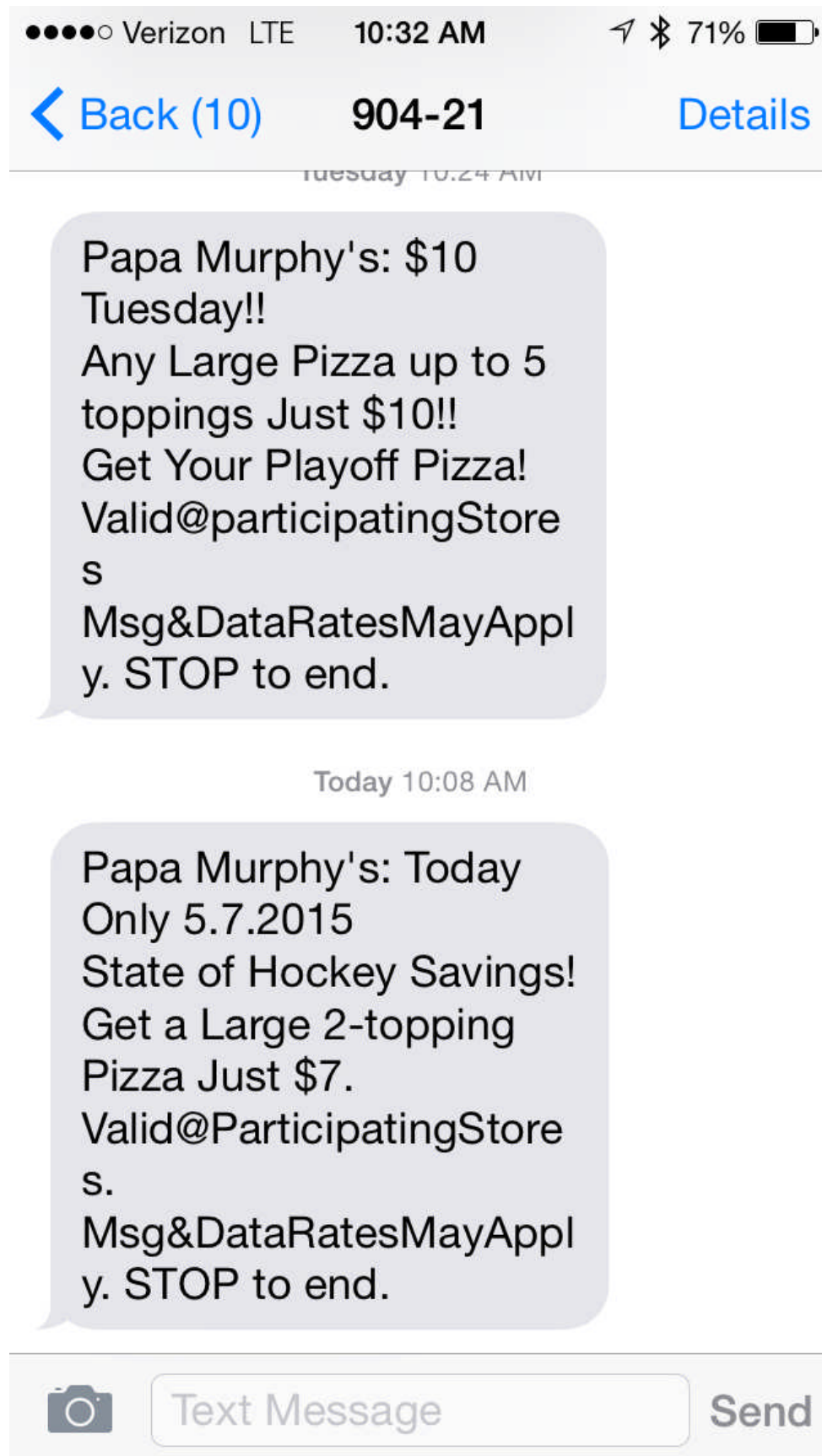
Sunday 10:01 AM

Papa Murphy's: Today  
Only 4.26.2015  
Home Ice Advantage!  
Get \$4 off any Family  
Size Pizza@reg menu  
price.  
Valid@particStores.  
Msg&DataRatesMayAppl  
y. STOP to end.





Papa Murphy's: Today  
only 5.3.2015  
Let's stuff Chicago!Get a  
Large Chicago  
StuffedPizza just \$10.  
Valid@participatingStore  
s.  
Msg&DataRatesMayAppl  
y. STOP to end.



# Exhibit B

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN LENNARTSON, on behalf of  
himself and all others similarly situated,

Plaintiff,

v.

PAPA MURPHY'S HOLDINGS, INC.,;  
and PAPA MURPHY'S  
INTERNATIONAL LLC,

Defendants.

CASE NO. C15-5307 RBL

ORDER DENYING SUMMARY  
JUDGMENT AND STAYING THE  
CASE

DKT. #19

THIS MATTER comes before the Court on Defendants Papa Murphy's Motion for Summary Judgment. [Dkt. #19, 23 praecipe]. Plaintiff Lennartson claims Papa Murphy's text messaged him and his putative class members without adequate prior express consent in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Papa Murphy's argues that it obtained proper prior consent, and the FCC's 2012 interpretation of the TCPA is unconstitutional. It alternatively asks for a stay of these proceedings until the Supreme Court decides in *Spokeo, Inc. v. Robbins*, \_\_ U.S. \_\_, 135 S. Ct. 1892 (2015), whether Congress may confer Article III standing upon plaintiffs who suffer no concrete harm by authorizing private rights of action for bare violations of a federal statute.

1 In 2011, Papa Murphy's started texting those who had signed-up on its website to receive  
2 promotional messages and those who had texted numbers appearing in its advertisements. Its  
3 website informed consumers that they would receive four text messages per month and that  
4 message and data rates might apply. Lennartson registered through Papa Murphy's website in  
5 March 2012 to receive promotional text messages. [Dkt. #21, Brawley Dec.].

6 Papa Murphy's texted him at least eleven times. [Dkt. #2, Exhibit A, Text Message  
7 Screenshots]. He did not reply "stop" to any of these messages. On June 15, 2015, Papa  
8 Murphy's stopped texting those who had opted to receive messages before October 16, 2013.

9 Under the TCPA, it is unlawful for any person to use an automatic telephone dialing  
10 system<sup>1</sup> to call or text another's cell phone except for emergency purposes or unless prior  
11 express consent has been given. *See* 47 U.S.C. § 227(b)(1)(A)(iii); *see also Satterfield v. Simon*  
12 *& Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir.) (holding that the FCC's interpretation that a text  
13 message is a "call" within the TCPA is reasonable). The FCC ruled in 1992 that absent  
14 instructions to the contrary, persons who knowingly released their phone numbers consented to  
15 be autodialed. *See In re Rules & Regs. Implementing the TCPA of 1991*, 7 FCC Rcd. 8752, 8769  
16 (Oct. 16, 1992).

17 The FCC revised this ruling in February 2012, concluding that the required prior express  
18 consent must be in writing. *See In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC  
19 Rcd. 1830, 1838, (Feb. 15, 2012) (hereinafter *2012 Order*). It defines "prior express written  
20 consent" as a written agreement authorizing delivery of advertisements or telemarketing  
21 messages by an autodialer to the signatory's telephone number. *See id.* at 1863. It requires the

---

22  
23 <sup>1</sup> An "automatic telephone dialing system" is equipment with the capacity to store or produce  
24 telephone numbers using a random or sequential number generator and to dial such numbers. *See*  
47 U.S.C. § 227(a)(1).

1 written agreement to include a clear and conspicuous disclosure: entering into the agreement is  
2 not a condition of purchase, an electronic signature is enforceable, and by executing the  
3 agreement, the signatory authorizes the seller to deliver telemarketing text messages using an  
4 autodialer. *See id.* at 1844, 1863. The FCC granted those who had obtained consent under the  
5 1992 Order until October 16, 2013 to comply with these new prior written consent requirements.  
6 *See id.* at 1857; *see also In re Rules & Regs. Implementing the TCPA of 1991*, 30 FCC Rcd.  
7 7961, 8015 (July 10, 2015) (hereinafter *2015 Order*).

8 In July 2015, the FCC answered petitions by the Coalition of Mobile Engagement  
9 Providers and Direct Marketing Association to clarify its 2012 Order. *See 2015 Order*, 30 FCC  
10 Rcd. at 8012. Petitioners asked whether written consent obtained in congruence with the 1992  
11 Order satisfied the 2012 Order. *See id.* The FCC reiterated such consent was not compliant  
12 merely because it was in writing. *See id.* at 8014. To be sufficient, the consent had to meet the  
13 definitional requirements of “prior express written consent” that the FCC’s 2012 Order had  
14 outlined and had given telemarketers nearly two years to meet. *Compare 2012 Order*, 27 FCC  
15 Rcd. at 1844, 1863, *with 2015 Order*, 30 FCC Rcd. at 8013–14.

16 The FCC acknowledged, however, that petitioners could have reasonably interpreted its  
17 2012 Order to suggest that consent previously given in writing would remain valid even if it did  
18 not satisfy the additional requirements of “prior express written consent” outlined by that Order.  
19 *See id.* For this reason, the FCC granted petitioners a waiver, effective retroactively and 89 days  
20 from the Declaratory Ruling, giving them additional time to make the disclosures necessary to  
21 obtain proper consent (as defined by the 2012 Order). *See id.* at 8014–15.

At issue is whether Papa Murphy's made sufficient disclosures to Lennartson such that it obtained proper consent to text him with an autodialer system and whether this case should be stayed pending resolution of *Spokeo, Inc. v. Robbins*.

## I. DISCUSSION

### A. Summary Judgment Standard.

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50, 106 S. Ct. 2505 (1986); *see also Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *See Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. The moving party bears the initial burden of showing no evidence exists that supports an element essential to the nonmovant's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). Once the movant has met this burden, the nonmoving party then must show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323–24.

**B. Papa Murphy’s Failed to Obtain Adequate Written Consent, and the 2015 Order Applies Retroactively.**

Papa Murphy’s argues that it should not be penalized for its noncompliance with the 2012 Order because (1) under its interpretation of that rule, the prior express consent it had obtained under the 1992 Order remained valid because it was in writing, and the FCC concedes that its 2012 Order could have reasonably been interpreted that way; and (2) the 2015 Order represents an agency adjudicatory restatement that this Court cannot apply retroactively under *Montgomery Ward*, 691 F.2d 1322, 1333 (9th Cir. 1982), because its consent requirements caused a significant change in the law.

Lennartson argues that (1) the 2012 Order did not grandfather existing written consents that did not meet the definitional requirements of “prior express written consent”—that did not include a disclosure that an autodialer would be used and consent was not a condition of purchase—and (2) the 2015 Order, which only *clarified* an existing rule, can be applied retroactively under *Qwest Services Corporation v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

Papa Murphy’s failed to comply with the requirements of written consent as defined by the 2012 Order. It continued to text Lennartson after October 16, 2013 without disclosing that it was using an autodialing system to do so. *See 2012 Order*, 27 FCC Rcd. at 1843–44, 1857, 1863.

In *Montgomery Ward*, the Ninth Circuit explained when an agency’s interpretation of a rule—an application of a previously articulated rule to particular factual circumstances—applies retroactively. *See* 691 F.2d at 1328–29, 1333. It adopted the D.C. Circuit’s five factor test for balancing a regulated party’s interest in being able to rely on a rule’s plain terms against an agency’s interest in retroactive application:

1 Among the considerations that enter into a resolution of the  
2 problem are (1) whether the particular case is one of first  
3 impression, (2) whether the new rule represents an abrupt  
4 departure from well established practice or merely attempts to fill a  
5 void in an unsettled area of law, (3) the extent to which the party  
6 against whom the new rule is applied relied on the former rule, (4)  
7 the degree of the burden which a retroactive order imposes on a  
8 party, and (5) the statutory interest in applying a new rule despite  
9 the reliance of a party on the old standard.

10 *See id.* at 1333 (citing *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380,  
11 390 (D.C. Cir. 1972)). The presumption of retroactivity does not apply if balancing weighs in  
12 favor of the regulated party—when retroactivity would cause manifest injustice. *See Qwest*  
13 *Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (citing *AT&T v. FCC*, 454 F.3d 329,  
14 332).

15 The FCC’s 2015 Order clarified its 2012 Order. The 2015 consent requirements were not  
16 an abrupt shift in the law, but rather, an affirmation of a rule articulated three years earlier. The  
17 2012 Order “requires prior express written consent for all telephone calls using an automatic  
18 telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless  
19 numbers and residential lines.” *2012 Order*, 27 FCC Rcd. at 1838. It defines “prior express  
20 written consent” as a written agreement that includes a conspicuous disclosure: by executing the  
21 agreement, the signator authorizes the seller to deliver her telemarketing messages using an  
22 autodialer and signing the agreement is not a condition of purchase. *See id.* at 1863. The 2015  
23 Order repeats that the 2012 Order “requires prior express written consent for telemarketing calls;  
24 to get such consent, telemarketers must tell consumers the telemarketing will be done with  
autodialer equipment and that consent is not a condition of purchase.” *2015 Order*, 30 FCC Rcd.  
at 8012–13. The 2015 Order did not supplant the 2012 Order. *See id.* at 8012–15.

1 Papa Murphy's did not follow the 2012 Order's requirements, nor did it petition the FCC  
2 for clarification or relief. Despite the FCC's acknowledgement that some uncertainty surrounded  
3 its 2012 Order, Papa Murphy's reliance "on its own (rather convenient) assumption that unclear  
4 law would ultimately be resolved in its favor is insufficient to defeat the presumption of  
5 retroactivity" upon clarification, because Papa Murphy's did not rely on settled law contrary to  
6 the 2012 Order. *Qwest*, 509 F.3d at 540. Instead, it relied on its own erroneous reading of that  
7 Order. Thus, the first three criteria weigh in favor of retroactivity.

8 Retroactivity would place a heavy burden on Papa Murphy's. If the Court were to certify  
9 the proposed class, Papa Murphy's potential liability could be substantial. This criterion weighs  
10 in Papa Murphy's favor.

11 Last, a statutory interest in applying the 2015 Order (which upholds the 2012 Order)  
12 exists because the FCC first articulated its prior express written consent rule in 2012. If the 2012  
13 Order confused Papa Murphy's, it could have petitioned the FCC for relief years ago, as the  
14 Coalition of Mobile Engagement Providers and Direct Marketing Association did.<sup>2</sup>

15 Therefore, Papa Murphy's failed to comply with the 2012 Order, and nevertheless, the  
16 2015 Order applies retroactively— to October 16, 2013 when the 2012 Order took effect. Papa  
17 Murphy's motion for summary judgment is DENIED.

18 **C. This Court Lacks Jurisdiction to Determine the Validity of the FCC's Rulings.**

19  
20  
21

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22 <sup>2</sup> Although an interest exists in applying a rule articulated by the FCC in 2012, repeated in 2015,  
23 and never administratively questioned by Papa Murphy's, the Court acknowledges that an  
24 automatic telephone dialing system may annoy consumers less when used to text them rather  
than to robocall them, because text recipients need not converse with a machine. Disclosure of  
the use of this system might therefore be less significant in the text messaging context.

Papa Murphy's also argues that the FCC's 2012 rule change, as set forth in 47 C.F.R. § 64.1200(a)(2)<sup>3</sup>, is a content-based restriction on speech that cannot survive strict scrutiny under *Reed v. Town of Gilbert, Ariz.*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218, 2226 (2015). Lennartson argues that this Court lacks jurisdiction to assess the validity of the FCC's regulation because the circuit courts have exclusive jurisdiction under the Hobbs Act, 28 U.S.C. § 2342 *et seq.*, but even if the Court were to rule, the regulation properly limits commercial speech.

The courts of appeals have exclusive jurisdiction to determine the validity of the FCC's orders. *See* 28 U.S.C. § 2342(1); *see also US W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396–97 (9th Cir. 1996). "Orders" include regulations. *See Cubbage v. Talbots, Inc.*, 2010 WL 2710628, at \*4 (W.D. Wash. July 7, 2010); *see also Gottlieb v. Carnival Corp.*, 635 F.Supp.2d 213, 220–21 (E.D.N.Y.2009) (discussing *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416, 62 S. Ct. 1194 (1942)). Therefore, this Court lacks jurisdiction to review the constitutionality of the FCC's 2012 Order and 47 C.F.R. § 64.1200(a)(2).

Papa Murphy's motion for summary judgment on constitutionality grounds is DENIED.

#### **D. Motion to Stay.**

Alternatively, Papa Murphy's asks the Court to stay these proceedings until the Supreme Court decides whether Congress may confer Article III standing on a plaintiff who has only alleged a private right of action based on a violation of a federal statute. *See Spokeo, Inc. v. Robbins*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1892 (2015). Lennartson argues *Spokeo* is irrelevant, because he

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<sup>3</sup> No person or entity may "[i]nitiate or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any ... lines or telephone numbers ..., other than a call made with the prior express written consent of the called party ...." 47 C.F.R. § 64.1200(a)(2).

1 and his putative class members allege actual injury—not merely a statutory violation of the  
2 TCPA.

3 In considering a motion to stay, the Court must balance the competing interests that a  
4 grant or a refusal will affect. *See CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing  
5 *Landis v. North American Co.*, 299 U.S. 248, 254–255, 57 S. Ct. 163 (1936). It considers the  
6 possible damage that might result from a grant, the hardship or inequity a party might suffer by  
7 advancing the case, and the orderly course of justice measured by the simplification or  
8 complication of the issues, proof, and questions of law that could result from a stay. *See id.* The  
9 party seeking a stay bears the burden of showing his entitlement. *See Latta v. Otter*, 771 F.3d  
10 496, 498 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 433–34, 129 S. Ct. 1749 (2009)).

11 Lennartson has articulated actual harm, explaining that consumers often must pay their  
12 cell phone service providers for each message received. *See* Dkt. #1, ¶ 4, ¶ 46 (“As a result of  
13 Defendants’ violation, the members of the Class suffered actual damages by, inter alia, having to  
14 pay their respective wireless carriers for the text messages where applicable.”). He will have  
15 standing regardless of the Supreme Court’s decision.

16 But *Spokeo* could simplify or complicate the class certification process. For example, it  
17 could limit the size of Lennartson’s putative class to those who paid their providers for each  
18 message Papa Murphy’s sent them. Little advantage to proceeding with discovery and motions  
19 practice in the interim exists. Therefore, to promote the orderly course of justice, Papa Murphy’s  
20 motion to stay the case until the Supreme Court resolves *Spokeo* is GRANTED.

21 The Court previously granted the parties’ stipulated motion [Dkt. #31] extending the  
22 deadline for Lennartson to file a class certification motion by 120 days from the date of this  
23  
24

1 Order. That Order [Dkt. #32] is AMENDED, and the deadline for class certification is  
2 EXTENDED by 30 days from the Supreme Court's *Spokeo* decision.

3 The parties shall notify the Court within seven days of the Supreme Court's decision.

## 4 II. CONCLUSION

5 The Court ORDERS:

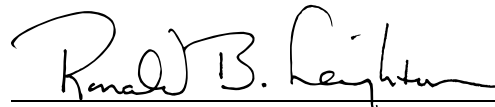
6 Papa Murphy's Motion for Summary Judgment [Dkt. #19] is DENIED.

7 Its Motion to Stay [Dkt. #19] the case until the Supreme Court resolves *Spokeo, Inc. v.*  
8 *Robbins*, \_\_ U.S. \_\_, 135 S. Ct. 1892 (2015) (No. 13-1339), is GRANTED. The parties shall  
9 notify the Court within seven days of the Supreme Court's decision.

10 In light of this stay, the class certification deadline is AMENDED. [Dkt. #32].  
11 Lennartson has 30 days from the Supreme Court's *Spokeo* decision to move for certification.

12 Papa Murphy's moves to strike the article referenced at footnote 8 of Lennartson's  
13 Reponse and the article found at Exhibit G of the Hoidal Declaration. The quoted statements by  
14 Papa Murphy's chief marketing executive and by its director of corporate communications  
15 contained therein are admissible non-hearsay. *See* FRE 801(d)(2)(D). The advertisements are  
16 admissible non-hearsay too. Therefore, Papa Murphy's Motion to Strike these articles is  
17 DENIED. [Dkt. #27]. A broken link prevented the Court from considering Papa Murphy's  
18 Motion to Strike the article referenced at footnote 7 of Lennartson's Response. [Dkt. #27].

19 Dated this 5<sup>th</sup> day of January, 2016.

20  
21 

22 Ronald B. Leighton  
23 United States District Judge  
24

# Exhibit C

INTERNET ARCHIVE  
waybackmachine  
68 captures  
26 May 02 - 5 Sep 15

http://www.papamurphys.com/eclub Go

MAR JAN  
31  
2011 2014



[MENU](#) [LOCATIONS](#) [DEALS](#) [ECLUB](#)

FIND YOUR STORE

## eClub

### Join the eClub.

We'll send fresh-baked savings right to your inbox.

#### Email

Why go looking for a deal when you can have one sent right to your inbox? Papa Murphy's eClub members enjoy great deals all year long. For more information, see our [Privacy Policy](#).

### Deals

Check out exclusive Papa Murphy's coupons in your area.

[GET THE DEALS](#)

INTERNET ARCHIVE  
**Wayback Machine**  
68 captures  
26 May 02 - 5 Sep 15

<http://www.papamurphys.com/eclub>

MAR JAN  
◀ 31  
2011 2014

<http://emus.papamurphys.com/eclubProduction-new.asp>

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[Show All](#)

INTERNET ARCHIVE  
Wayback Machine  
68 captures  
26 May 02 - 5 Sep 15

<http://www.papamurphys.com/eclub> Go

MAR JAN 31  
2011 2014

To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive four text messages per month. To unsubscribe from our text club at any time, text **STOP** to **90421**. For questions or help with the text club, text **HELP** to **90421**, or call 800-257-7272, or email us at [guestservices@papamurphys.com](mailto:guestservices@papamurphys.com).

[http://www.phizzlemobile.com/papa\\_murphys\\_form.php](http://www.phizzlemobile.com/papa_murphys_form.php)

Latest

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See [www.phizzlemobile.com robots.txt](http://www.phizzlemobile.com/robots.txt) page. [Learn more](#) about robots.txt.

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## eClub FAQ

Didn't receive your birthday email?

Didn't receive your opt-in message after signing up?

Didn't get any messages from the Papa Murphy's eClub lately?

INTERNET ARCHIVE  
**Wayback Machine**  
OUR STORY

68 captures  
26 May 02 - 5 Sep 15

MAR JAN  
◀ 31  
2011 2014

JOIN OUR FAMILY

WATCH OUR VIDEO

The concept of "take-n-bake" pizza was invented by Papa Murphy's in 1981. But today, we focus on what has made Papa Murphy's the fifth largest pizza company in the United States and Zagat's #1 Rated Pizza Chain: our commitment to FRESH.....[Read More](#)

Looking for FRESH business opportunities? Convert your passion for pizza into a rewarding career.

[FRANCHISE OPPORTUNITIES](#)

[CAREER OPPORTUNITIES](#)



[FAQs](#) [Gift Cards](#) [Press Room](#) [Contact Us](#) [Privacy Policy](#) [Terms & Conditions](#) [Site Map](#)

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# Exhibit D

INTERNET ARCHIVE  
**Wayback Machine**  
68 captures  
26 May 02 - 5 Sep 15

<http://www.papamurphys.com/eclub/>

FEB MAR  
◀ 30  
2011 2014



[MENU](#) [LOCATIONS](#) [DEALS](#) **[ECLUB](#)**

FIND YOUR STORE

## eClub

### Join the eClub.

We'll send fresh-baked savings right to your inbox.

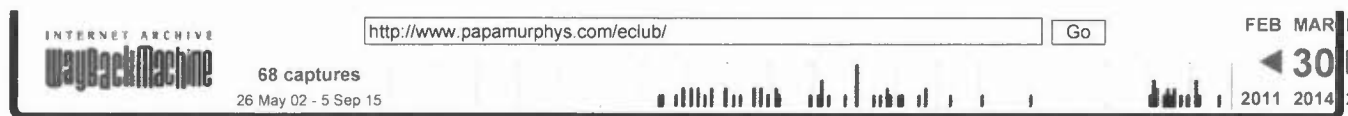
#### Email

Why go looking for a deal when you can have one sent right to your inbox? Papa Murphy's eClub members enjoy great deals all year long. For more information, see our [Privacy Policy](#).

### Deals

Check out exclusive Papa Murphy's coupons in your area.

[GET THE DEALS](#)



## Text

To join Papa Murphy's Text Club for coupons & special offers, please enter your mobile number below. You will receive four text messages per month. To unsubscribe from our text club at any time, text **STOP** to **90421**. For questions or help with the text club, text **HELP** to **90421**, or call 800-257-7272, or email us at [guestservices@papamurphys.com](mailto:guestservices@papamurphys.com).

[http://www.phizzlemobile.com/papa\\_murphys\\_form.php](http://www.phizzlemobile.com/papa_murphys_form.php)

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See [www.phizzlemobile.com robots.txt](http://www.phizzlemobile.com/robots.txt) page. [Learn more](#) about robots.txt.

## eClub FAQ

Didn't receive your birthday

Didn't receive your opt-in message after signing

Didn't get any messages from the Papa Murphy's eClub lately?

INTERNET ARCHIVE  
**Wayback Machine**  
OUR STORY

68 captures  
26 May 02 - 5 Sep 15

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2011 2014

JOIN OUR FAMILY

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The concept of "take-n-bake" pizza was invented by Papa Murphy's in 1981. But today, we focus on what has made Papa Murphy's the fifth largest pizza company in the United States and Zagat's #1 Rated Pizza Chain: our commitment to FRESH.....Read More

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# Exhibit E

INTERNET ARCHIVE  
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2014 2015



[MENU](#) [ORDER](#) [DEALS](#)

FIND YOUR STORE

## Exclusive Offers

INTERNET ARCHIVE  
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31 Jan 14 - 5 Sep 15

http://www.papamurphys.com/deals Go

FEB MAR  
7  
2014 2015

You're just one step away from making your life easier! Why search around your house and car for the best Papa Murphy's coupons when the most exclusive offers can be sent directly to your inbox or phone? So sit back and relax (we know it's rare), and wait for the money saving offers to come your way.

Sign up now!

First Name	Last Name
<input type="text"/>	<input type="text"/>
Email	Mobile Number
<input type="text"/>	<input type="text"/>
Zip/Postal Code	Birthday
<input type="text"/>	<input type="text"/> MM <input type="text"/> DD
<input type="checkbox"/> Sign me up for email deals	
<input type="checkbox"/> Sign me up for mobile deals	
<input type="checkbox"/> I'm over 18	
<input type="button" value="SUBMIT"/>	

If you are one of our Canadian customers, you aren't left out. Just sign up at [papamurphys.ca/eclub](http://papamurphys.ca/eclub).  
For more information, see our [Privacy Policy](#).

## eClub FAQ

### Didn't receive your email opt-in message after signing up?

Try this, add [eClub@reply.papamurphys.com](mailto:eClub@reply.papamurphys.com) to your email address book. Also, check the Junk/Spam box in your email program to see if the message came there by accident, then you can mark it as legitimate so future emails come to your

### Didn't get any messages from the Papa Murphy's eClub lately?

To ensure delivery, add [eClub@reply.papamurphys.com](mailto:eClub@reply.papamurphys.com) to your email address book..

INTERNET ARCHIVE  
**Wayback Machine**  
OUR STORY

61 captures  
31 Jan 14 - 5 Sep 15

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JOIN OUR FAMILY

WATCH OUR VIDEO

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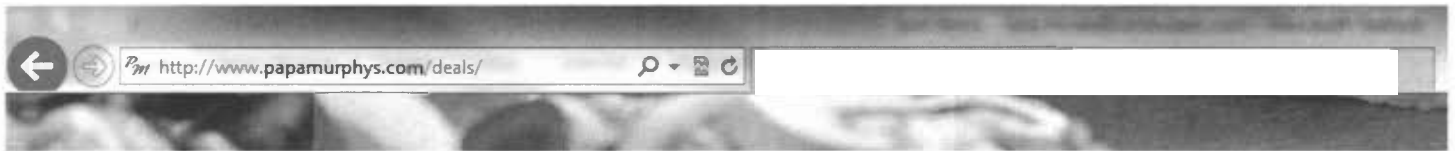
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# Exhibit F



## Join our Family.

You're just one step away from making your life easier! Why search around your house and car for the best Papa Murphy's coupons when the most exclusive offers can be sent directly to your inbox or phone? So sit back and relax (we know it's rare), and wait for the money saving offers to come your way.

Sign up now!

First Name

Last Name

Email

Mobile Number

Zip/Postal Code

Birthday

- ☐ Sign me up for email deals
- ☐ Sign me up for mobile deals
- ☐ I'm over 18

SUBMIT

# Exhibit G

- Mobile Commerce Daily - <http://www.mobilecommercedaily.com> -

## Papa Murphy's grows mobile database, pushes offers via SMS campaign

Posted By [Rimma Kats](#) On September 23, 2011 @ 4:30 am In [Featured](#), [Food and beverage](#), [Messaging](#) | [No Comments](#)



<sup>[1]</sup>Pizza chain Papa Murphy's is adding mobile to its marketing efforts and offering consumers exclusive offers via SMS.

The company partnered with Phizzle for the mobile marketing initiative. Papa Murphy's is using mobile to grow fan loyalty and increase customer revenues.

"Papa Murphy's is looking to provide to the company's franchise owners a low-cost, easy-to-administer method of marketing to customers," said Jenifer Anhorn, chief marketing executive at Papa Murphy's.

"Papa Murphy's had not done much in the way of mobile marketing previously," she said. "Papa Murphy's wanted to get involved in digital marketing to complement Papa Murphy's traditional tools such as print, radio and broadcast.

"Our goal is to help the franchise owners increase sales through corporate marketing initiatives."

[Papa Murphy's](#) <sup>[2]</sup>operates more than 1,250 franchised and corporate-owned locations in 37 states and Canada.

[Phizzle](#) <sup>[3]</sup>is a mobile marketing and advertising provider delivering audience engagement services to grow fan loyalty, increase customer revenues and harness brand equity.

### Pizza pizza

Papa Murphy's is running customized in-store signage, mobile campaigns and promotions featuring mobile text alerts to develop an opt-in mobile database.

Consumers can opt-in to receive notifications 3-4 times each month at their favorite locations.

The alerts feature free or discounted pizza, additional toppings or size upgrades.

"Partnering with Phizzle enables Papa Murphy's to gather phone numbers and email addresses," Ms. Anhorn said. "List building is the first step to being able to leverage the names and numbers when offers are blasted."

### Word of mouth

Papa Murphy's is getting the word out about the campaign via in-store point-of-sale material and small flyers that are placed on each pizza box.



[4]

*An example of a small flyer*

"More and more people are using smartphones and texting, especially the younger customers," Ms. Anhorn said. "This is just where marketing is going.

"Presently, five Papa Murphy's restaurants are participating, with several more in the works now and the goal is to get 20-30 ramped up in the next 2-3 months," she said.

#### **Final Take**

*Rimma Kats is staff reporter on Mobile Commerce Daily, New York*



[5]

[6]

[7]

Article printed from Mobile Commerce Daily: <http://www.mobilecommercedaily.com>

URL to article: <http://www.mobilecommercedaily.com/papa-murphy%e2%80%99s-grows-mobile-database-pushes-offers-via-sms-campaign>

URLs in this post:

[1] Image: <http://www.mobilecommercedaily.com/wp-content/uploads/2011/09/pizza-1.jpg>

[2] Papa Murphy's : <http://www.papamurphys.com>

[3] Phizzle : <http://www.mobilecommercedaily.com> <http://www.phizzle.com>

[4] Image: <http://www.mobilecommercedaily.com/wp-content/uploads/2011/09/pizza2.jpg>

[5] Image: <https://www.facebook.com/sharer/sharer.php?u=http%3A%2F%2Fwww.mobilecommercedaily.com%2Fpapa-murphy%25e2%2580%2599s-grows-mobile-database-pushes-offers-via-sms-campaign&t=Papa+Murphy%E2%80%99s+grows+mobile+database%2C+pushes+offers+via+SMS+campaign>

[6] Image: <http://www.linkedin.com/shareArticle?mini=true&url=http%3A%2F%2Fwww.mobilecommercedaily.com%2Fpapa-murphy%25e2%2580%2599s-grows-mobile-database-pushes-offers-via-sms-campaign&title=Papa+Murphy%E2%80%99s+grows+mobile+database%2C+pushes+offers+via+SMS+campaign>

[7] Image: <https://twitter.com/share?url=http%3A%2F%2Fwww.mobilecommercedaily.com%2Fpapa-murphy%25e2%2580%2599s-grows-mobile-database-pushes-offers-via-sms-campaign&text=Papa+Murphy%E2%80%99s+grows+mobile+database%2C+pushes+offers+via+SMS+campaign&via=MCommerceDaily>

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